INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:	
Frank v. *Mangum*, 237 U. S. 309	6
Litchfield v. *Goodnow*, 123 U. S. 549	5
United States v. *Adams*, 281 U. S. 202	6
United States v. *Carlisi*, 32 F. Supp. 479	6
United States v. *Oppenheimer*, 242 U. S. 85	6
Statutes:	
Internal Revenue Code:	
Sec. 2553 (a) [26 U. S. C. 2553 (a)]	2
Sec. 2557 (b) (1) [26 U. S. C. 2557 (b) (1)]	2
New Jersey Stat. Ann. 24:18–49	7
Louisiana Revised Statutes, Title 40, section 962	2
Uniform Narcotic Drug Act, Sec. 21	7

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 291

RUSSELL S. SERIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 193–196) is reported at 203 F. 2d 576.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1953 (R. 197). A petition for rehearing (R. 198–201) was denied on July 27, 1953 (R. 202). The petition for a writ of certiorari was filed on August 25, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the doctrine of *res judicata,* a state court acquittal of a state offense of possession of narcotics is conclusive against a Federal charge of purchase in an unstamped package, where the purchase is evidenced by the same possession.

STATUTES INVOLVED

Internal Revenue Code:

> Sec. 2553 (a) [26 U. S. C. 2553 (a)] It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found * * *.
>
> Sec. 2557 (b) (1) [26 U. S. C. 2557 (b) (1)] Any person who violates or fails to comply with any of the requirements of this subchapter * * * shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

Louisiana Revised Statutes, Title 40, section 962:

> It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as provided in this Sup-part [A] * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Fifth Circuit (R. 197), affirming a judgment of the District Court for the Eastern District of Louisiana adjudging petitioner guilty upon the verdict of a jury (R. 185) and imposing a sentence of 42 months' imprisonment for violation of the Internal Revenue Code by purchasing narcotics not in the original stamped package.

The record may be summarized as follows: On January 5, 1951, petitioner parked his car across the street from a residence in New Orleans while an investigation was being made by three officers of the New Orleans police department upon information that the occupant of the residence was in possession of narcotics (R. 53–54, 56, 64–66, 75–77, 171, 174–176). According to the police testimony, petitioner called the occupant by name and, when the police came over to the car, was found to be in possession of 100 capsules of heroin hydrochloride, unstamped, and he admitted having capped these in his automobile (R. 56–58, 61, 63–64, 66, 68–70, 73–74, 77–81, 84, 88, 92–94, 171). According to testimony of petitioner and defense witnesses, petitioner had come to the neighborhood to pick up a friend of his daughter, and had no possession or knowledge of the narcotics (R. 122–127, 129–131, 132–134, 137–139, 142–145, 149, 152, 154, 160, 164–168, 172).

On July 25 or July 26, 1951, petitioner was tried in the state court for violation of the Louisiana narcotics act by reason of possession of the capsules, and was acquitted (R. 48–49, 90, 128). On August 31, 1951, the federal grand jury returned a one-count indictment charging petitioner with purchasing the capsules from some person or persons unknown, the heroin hydrochloride not being in or from the original stamped package (R. 2).

Petitioner moved to dismiss the indictment, alleging that in the state court proceeding he had been found not guilty of possession of the heroin hydrochloride and that possession of the same capsules was the basis of the federal indictment (R. 48–50). The motion was denied, and petitioner did not again assert the prior adjudication at the various times during the trial when testimony as to his possession was presented (R. 51). The trial judge submitted the question of possession to the jury (R. 181–182) without any exceptions to the instructions by petitioner (R. 182).

The Court of Appeals for the Fifth Circuit, in affirming the judgment of the District Court, deemed it unnecessary to pass upon the question of whether *res judicata* was properly raised by the motion to dismiss, since the court concluded that "[w]hile the same facts can not be twice litigated by the same sovereign against the same defendant, that principle is inapplicable where, as here, the subsequent prosecution is by another

sovereign who was not a party to the first." (R. 196.)

ARGUMENT

Petitioner concedes that his motion to dismiss was not predicated upon double jeopardy, since the elements of the Louisiana offense of illegal possession of narcotics are not the same as the federal offense of purchase contrary to the federal tax laws (Pet. Br. 2). He contends, however, that the question of his possession of the narcotics had been decided adversely to the state government in the state court and that this adjudication, under the doctrine of *res judicata* or upon the basis of estoppel, may not be challenged by the federal government.

However, it is of the essence of the doctrine of *res judicata* that the litigation shall have been between the same parties or their privies. *Litchfield* v. *Goodnow,* 123 U. S. 549, 550–552. Any disregard of this fundamental requirement would open the door to binding of litigants by past conduct of others, without power to the later litigants to present or cross-examine witnesses, or to appeal. The acquittal in the proceeding by the state court is, accordingly, effective neither as a bar to the independent proceeding of the federal government nor as conclusive evidence in the proceeding by that separate sovereignty.[1] No ques-

[1] The authorities relied upon by petitioner (Pet. Br. 3, 6, 9, 10) all involve cases in which the parties or their privies

tion of full faith and credit is involved. The failure to find the acquittal in the state court conclusive is not based upon any failure to recognize the state court's decision, but upon the ground that the same parties were not involved.

It is to be noted that where a legislative body desires that there shall be no second prosecution, for an offense already tried by another sovereign governmental body, it enacts a statute to that ef-

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were the same in both the earlier and the later proceeding. Thus, in *United States* v. *Oppenheimer*, 242 U. S. 85, 86, a bankrupt had obtained a favorable adjudication by pleading a one-year statute of limitations against a charge of a conspiracy to conceal assets. Later authority on the statute of limitations question, in a case involving other persons, indicated that the adjudication was erroneous. Defendant was then sought to be tried again on the same charge of concealment by the same sovereign authority, *i. e.*, the federal government. The decision established only that the prohibition against double jeopardy was in addition to, and not in exclusion of the rule of *res judicata;* the Court did not purport to enlarge, or have occasion to enlarge, the doctrine of *res judicata* to apply beyond the specific parties to an earlier adjudication. Similarly, in *Frank* v. *Mangum*, 237 U. S. 309, the petition for a writ of habeas corpus was directed against custody by the State of Georgia, just as the prior complaints in the state courts had been directed, and if conclusiveness was accorded to the prior judgments of the state courts upon the same charges of improprieties (it is not clear that such effect was accorded; see p. 334), it was accorded to judgments "between the same parties" (237 U. S. at 334). In *United States* v. *Adams*, 281 U. S. 202, and *United States* v. *Carlisi*, 32 F. Supp. 479 (E. D. N. Y.), the parties were likewise the same, the federal government being the prosecuting party in both the first and later proceeding.

fect. Thus, the Uniform Narcotic Drug Act, § 21, adopted in 41 states (including Louisiana), the District of Columbia, Alaska, Hawaii, and Puerto Rico (and repealed in New Jersey: N. J. S. A. 24: 18–49), provides:

> No person shall be prosecuted for a violation of any provision of this act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission which, it is alleged, constituted a violation of this act.

The enactment of this provision clearly attests that in the absence thereof the judgment upon prosecution by one sovereign body is not binding in an action by another sovereign body. The absence of such a provision in the federal statute is persuasive that while there may be considerations weighing against the allowance of independent remedies by the dual sovereignties of state and federal governments with respect to the same act, the remedy must be by congressional enactment rather than by an unprecedented and unique judicial abrogation of the basic independence existing between state and federal criminal processes.

CONCLUSION

The questions presented were correctly decided below. No conflict of decisions and no question of law, as distinguished from legislative policy,

is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

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SUPREME COURT OF THE UNITED STATES

No. 235, Misc.—October Term, 1952.

Paul Shelton, Petitioner, *v.* United States of America.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 15, 1953.]

Per Curiam.

The petition for certiorari is granted. Upon consideration of the Government's confession of error, after reviewing the record in this case, we vacate the judgments of the Court of Appeals and the District Court. The case is remanded to the District Court for further proceedings in light of the confession of error.